

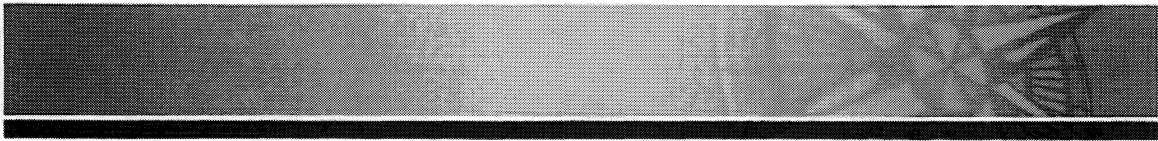


Fisheries and Oceans
Canada

Pêches et Océans
Canada

Canadian
Coast Guard

Garde côtière
canadienne



Reference #
GCCMS 2018-012-00634

AUG 3 0 2018

Chief Councillor Marilyn Slett
Heiltsuk Tribal Council
P.O. Box 880
Bella, Bella, BC
V0T 1Z0
MSlett@heiltsuknation.ca

Subject: Nathan E. Stewart Environmental Impact Assessment's way forward

Dear Chief Marilyn Slett,

I am writing to each of the lead representatives of the Unified Command established in response to the Nathan E. Stewart (NES) marine spill in 2016. I am doing so to advise you of the next steps that will be taken by the Canadian Coast Guard respecting that incident.

As you know, the articulated tug and barge unit of the NES ran aground on Edge Reef in Seaforth Channel on October 13th 2016. In response to the grounding, the Canadian Coast Guard responded with the Heiltsuk Nation, the Province of British Columbia, and the Shipowner representative. An Incident Command Post (ICP) was supported in Heiltsuk Tribal Council offices where the response phase was coordinated for six weeks. The ICP was led by a Unified Command team made up of Commanders from the Province of BC, the Heiltsuk Nation, the Shipowner, and the Canadian Coast Guard.

The NES was removed from the marine environment on November 14, 2016, and the ICP stood down on November 20, 2016. Since the closure of the ICP, the Heiltsuk Nation and Provincial and Federal Authorities have continued to work in the recovery phase of the spill, including by reaching agreement together on a draft requirements document for an Environmental Impact Assessment (EIA) in April 2017.

Between May and November 2017, the Province of BC and the Polluter worked bilaterally on an MOU regarding that April 2017 version of the EIA. This work was conducted without the Canadian Coast Guard or the Heiltsuk Nation involved in the related meetings.

Canada

- 2 -

In response to the bilateral meetings, a technical working group (BC Ministry of Environment, Fisheries and Oceans Canada, Environment and Climate Change Canada, and the Heiltsuk Nation) updated the EIA in Spring 2018. That draft document includes new language proposing that the Province 'direct' the Polluter to conduct the working group's EIA, and also proposes that subsequent work would require approval from the Heiltsuk Nation and other government agencies. That document has not been endorsed by the Canadian Coast Guard.

The authority for the Canadian Coast Guard to direct any person or vessel that has discharged or is likely to discharge a pollutant is found in section 180 of the Canada Shipping Act, 2001, which states:

180 (1) If the Minister of Fisheries and Oceans believes on reasonable grounds that a vessel or an oil handling facility has discharged, is discharging or is likely to discharge a pollutant, he or she may

- (a) take the measures that he or she considers necessary to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility, including, in the case of a vessel, the removal or destruction of the vessel and its contents, and may sell or otherwise dispose of the vessel and its contents;
- (b) monitor the measures taken by any person to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility; or
- (c) if he or she considers it necessary to do so, direct any person or vessel to take measures referred to in paragraph (a) or to refrain from doing so.

The Marine Liability Act sets out strict liability for shipowners in relation to marine oil spills up to calculated limits of liability. In addition to the financial limits of liability, there are time limitations in which Coast Guard or others may make claims against a shipowner or the Ship-source Oil Pollution Fund for pollution-related damages. Claims to the Ship-source Oil Pollution Fund can be submitted up to two years after the spill and can be submitted to the Shipowner up to three years from the occurrence. Requiring an EIA to be completed within those three years should fall into remedies that the Canadian Coast Guard could require from the Shipowner.

Given the time elapsed since the NES incident and the rapidly-approaching two-year window during which to recover the costs to conduct the Environmental Impact Assessment through the SOPF, the Coast Guard intends to take action, with a strong preference to do this through Unified Command. Accordingly, the Coast Guard will undertake the following:

- By the end of summer, the Canadian Coast Guard will finalize the EIA Terms of Reference based upon the draft requirements reached by Unified Command in April 2017, and the final recommendations of the ECCC Scientific Support Coordinator and DFO Science advisors to the CCG. The Canadian Coast Guard is prepared to

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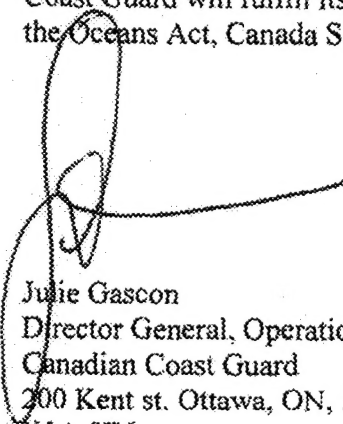
- 3 -

lead this activity by directing the Polluter to complete this EIA pursuant to section 180 of the Canada Shipping Act, 2001.

- Regional Coast Guard leadership will invite the other three original Incident Unified Commanders to a face-to-face meeting in the near future to attempt to reach consensus on the final Terms of Reference (TOR), and/or to articulate any items and issues that are not captured by the Coast Guards final endorsed Terms of Reference for the EIA.
- Thereafter, the Coast Guard Incident Commander will ensure that work arising from the approved EIA requirements is undertaken as soon as practicable.
- The Canadian Coast Guard will seek full cost recovery from the Polluter or the Ship-source Oil Pollution Fund for all public expenditures as applicable under the polluter-pay principle described above.

While the principle and practice of Unified Command is neither prescribed in law, nor explicit in the Canadian oil spill response regime, it remains the Canadian Coast Guard's strong preference to proceed in a Unified Command forum where Provincial and Heiltsuk Nation government interests are represented along with the Polluter during the recovery phase of this incident.

If a unified approach to the next step of the post-spill activities is not possible, the Canadian Coast Guard will fulfill its legal responsibilities, as lead Federal Agency, in accordance with the Oceans Act, Canada Shipping Act 2001, and Marine Liability Act.



Julie Gascon
Director General, Operations
Canadian Coast Guard
200 Kent st. Ottawa, ON, 5E2S7
K1A 0E6
Tel : 613-990-9172
Email: julie.gascon@dfo-mpo.gc.ca

c.c.: Roger Girouard, Assistant Commissioner, Western Region
Brian Wootton, Regional Director of Incident Management
Marc Sanderson, A/Director General, National Strategies

Labelle-Rice, Jolyane

From: Brach, Pader W ENV:EX <Pader.Brach@gov.bc.ca>
Sent: August-31-18 6:31 PM
To: Gascon, Julie
Cc: Girouard, Roger; Wootton, Brian; Van Roosmalen, Miriam; Sanderson, Marc; Labelle-Rice, Jolyane; Kryzanowski, Kelli ENV:EX
Subject: RE: 2018-012-00634 - Nathan E. Stewart Environmental Impact Assessment's way forward

Thank you for your letter, Julie. This is great news.

I look forward to supporting the CCG as per your proposed next steps.

Please let me know how I can be of further assistance to the CCG.

Sincerely,
Pader



Pader Brach
A/ Executive Director

Environmental Emergencies and Land Remediation
Branch
Victoria, BC
Office: 250-953-3855 Mobile: 250-812-2253

www.gov.bc.ca/spillsinfo  [@SpillsInfoBC](https://twitter.com/SpillsInfoBC)
Report a spill: 1-800-663-3456

From: Gascon, Julie [<mailto:Julie.Gascon@dfo-mpo.gc.ca>]
Sent: Thursday, August 30, 2018 11:55 AM
To: Brach, Pader W ENV:EX
Cc: Girouard, Roger; Wootton, Brian; Van Roosmalen, Miriam; Sanderson, Marc; Labelle-Rice, Jolyane
Subject: 2018-012-00634 - Nathan E. Stewart Environmental Impact Assessment's way forward

Dear Mr. Brach,

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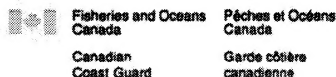
Should you have any questions or concerns, do not hesitate to contact me.

Warmest regards,

Julie Gascon
Director General, Operations / Directrice Générale, Opérations

Canadian Coast Guard / Garde côtière canadienne
200 Kent, Ottawa, ON, K1A 0E6, 5E257
O: 613-990-9172 / BB: [REDACTED]

s.16(2)



Reference #
GCCMS 2018-012-00634

AUG 30 2018

Pader Brach
Director, Environmental Emergency Program
Ministry of Environment & Climate Change Strategy
PO Box 9337 Stn Provincial Government
Victoria BC V8W 9M1
Pader.Brach@gov.bc.ca

Subject: Nathan E. Stewart Environmental Impact Assessment's way forward

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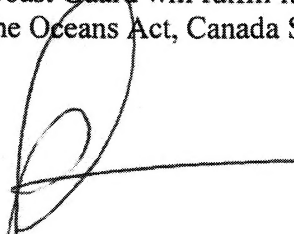
- 3 -

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If a unified approach to the next step of the post-spill activities is not possible, the Canadian Coast Guard will fulfill its legal responsibilities, as lead Federal Agency, in accordance with the Oceans Act, Canada Shipping Act 2001, and Marine Liability Act.



Julie Gascon
Director General, Operations
Canadian Coast Guard
200 Kent St. Ottawa, ON, 5E2S7
K1A 0E6
Tel : 613-990-9172
Email: julie.gascon@dfo-mpo.gc.ca

c.c.: Roger Girouard, Assistant Commissioner, Western Region
Brian Wootton, Regional Director of Incident Management
Marc Sanderson, A/Director General, National Strategies

Labelle-Rice, Jolyane

From: [REDACTED]
Sent: September-07-18 8:16 PM
To: Gascon, Julie
Cc: ENV.Minister@gov.bc.ca; Pader.Brach@gov.bc.ca; Minister / Ministre (DFO/MPO);
mintc@tc.gc.ca; Wootton, Brian; Girouard, Roger; Rolfe, Chris JAG:EX;
Debbie.Chan@gov.bc.ca; nicole.bresser@gov.bc.ca; Sanderson, Marc; Lisa Fong; Andrea
Kreutz
Subject: Re: 2018-012-00634 - Nathan E. Stewart Environmental Impact Assessment's way
forward
Attachments: 2018-09-07 LET LCF-JGascon (CCG) re response to Aug 30 ltr^final.pdf

Dear Ms. Gascon,

s.19(1)

Please find attached today's correspondence in this matter.

Sincerely,

[REDACTED]

Ng Ariss Fong | Lawyers

T: 604.331.1155 F: 604.677.5410 E: [REDACTED]

Randall Building
8th Floor, 555 West Georgia St.
Vancouver, BC, Canada V6B 1Z5

www.ngariss.com

see our blog, suite210: www.ngariss.com/blogs/suite-210/ and inDispute: www.ngariss.com/blogs/in-dispute/

This e-mail and any attachment(s) are confidential and may be privileged.
If you are not the intended recipient, please notify us immediately by
return e-mail, delete this e-mail and do not copy, use or disclose it.

Begin forwarded message:

From: "Gascon, Julie" <Julie.Gascon@dfo-mpo.gc.ca>
To: "Marilyn Slett" [REDACTED]
Cc: "Girouard, Roger" <Roger.Girouard@dfo-mpo.gc.ca>, "Wootton, Brian" <Brian.Wootton@dfo-mpo.gc.ca>, "Van Roosmalen, Miriam" <Miriam.VanRoosmalen@dfo-mpo.gc.ca>, "Sanderson, Marc" <Marc.Sanderson@dfo-mpo.gc.ca>
Subject: 2018-012-00634 - Nathan E. Stewart Environmental Impact Assessment's way forward

Dear Chief Marilyn Slett,

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forward. An official copy will be mailed to you shortly.

Should you have any questions or concerns, do not hesitate to contact me.

Warmest regards,

Julie Gascon

Director General, Operations / Directrice Générale, Opérations

Canadian Coast Guard / Garde côtière canadienne

200 Kent, Ottawa, ON, K1A 0E6, 5E257

O: 613-990-9172 / BB: [REDACTED]

s.16(2)

Ng Ariss Fong, Lawyers

Randall Building
8th Floor, 555 West Georgia Street
Vancouver, BC Canada V6B 1Z5

T: (604) 331-1155 F: (604) 677-5410

VIA EMAIL (julie.gascon@dfo-mpo.gc.ca)

September 7, 2018

Julie Gascon
Director General, Operations
Canadian Coast Guard
200 Kent Street, Ottawa ON K1A 0E6

s.19(1)

Dear Ms. Gascon:

Re: Commitments regarding the Environmental Impact Assessment

I write on behalf of Chief Councillor Marilyn Slett further to your letter of August 30, 2018 and Philip Murdock's email of September 6, 2018 addressed to the lead representatives of Unified Command, which was established in response to the *Nathan E. Stewart* ("NES") incident. Heiltsuk is deeply offended by the Canadian Coast Guard (the "CCG") intending to proceed without consultation and without consent on an inadequate Environmental Impact Assessment Plan ("Draft EIA Plan") resulting from the NES incident that will undoubtedly have an impact on Heiltsuk's Aboriginal rights and title.

We will not address all the inaccuracies in your letter as Heiltsuk has written numerous letters to Fisheries and Oceans Canada ("DFO") on the Draft EIA Plan, many of which have also been addressed or copied to the CCG.

However, there are two inaccurate points in your letter that we must address.

First, Heiltsuk did not agree to the Draft EIA Plan in April 2017. Heiltsuk has maintained its position that the Draft EIA Plan as of April 2017 was not adequate, and subsequently worked with the federal and provincial governments in 2018 to attempt to develop an adequate and robust EIA Plan. The CCG's statement that it is overriding the technical work that Heiltsuk, DFO, Environment and Climate Change Canada, and the B.C. Ministry of Environment and Climate Change Strategy ("MOE") – while refusing to conduct consultation with leadership – undermines the collaborative governance relationships that Canada has committed to under the Hálciístut: Framework Agreement for Reconciliation and the Reconciliation Framework Agreement for Bioregional Oceans Management and Protection as well as its adoption of UNDRIP.

Second, Heiltsuk is pleased that the CCG acknowledges its obligations under s. 180 of the *Canada Shipping Act, 2001*, SC 2001, c 26. However, the CCG has failed to recognize that it must carry out this obligation alongside its constitutional obligation to consult with Heiltsuk Nation and seek its consent on any decision that may impact its Aboriginal rights and title. Although the Federal Court of Appeal's recent decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 was factually different than this incident, this court decision further underscores the Crown's duty to meaningfully consult with First Nations and seek their consent. Further, Heiltsuk

has been clear that the Incident Command System is not consultation.

Heiltsuk has been seeking three commitments from DFO in relation to the EIA since March 2018. As the CCG is a special operating agency within DFO, as well as a representative of the Crown, Heiltsuk has been seeking these same commitments from CCG. To date, these commitments have either not been addressed in a meaningful way or not addressed at all.

As a reminder, the commitments that Heiltsuk is seeking from DFO are:

1. an acknowledgement that DFO, on behalf of Canada, has a duty to consult with the Heiltsuk Nation on the scope of the EIA;
2. to direct DFO's technical team to dialogue with the Heiltsuk technical team on a more robust EIA; and
3. to assist Heiltsuk in recovering expenses relating to the EIA from the polluter, Kirby Corporation ("Kirby").

Heiltsuk has sought a response to these commitments in letters addressed to DFO, and often CCG, dated April 3, April 18, May 11, May 15, May 30, June 25, July 23, and August 9, 2018. These letters also address the various issues you have raised, which we say have been set out factually inaccurately including the private negotiations between MOE and Kirby on the MOU, and the failure of federal and provincial government to ensure that Heiltsuk is recompensed for its expenses in engaging in the EIA. We note that your letter does not advise that the CCG will compensate Heiltsuk directly for its expenses in engaging in an EIA. We urge you to read and respond to our previous correspondence.

Heiltsuk is giving notice to the CCG that Heiltsuk Nation does not consent, has not been consulted, and will not be coerced into proceeding with an inadequate EIA. The CCG is leaving the Heiltsuk Nation with no option but to proceed with litigation to ensure a robust EIA is carried out.

We urge DFO and CCG to consult with the Heiltsuk Nation. At the technical consultation meeting held on March 5-6, 2018, there were various major issues identified by the MOE, DFO and Heiltsuk technical teams that must be resolved by their respective leadership in order for the EIA to proceed. It is crucial that your ministry acknowledge its duty to consult on the EIA and meet with Heiltsuk leadership as soon as possible. We urge your ministry to notify Heiltsuk that the dates communicated in Philip Murdock's email of September 6, 2018 for a meeting with all Unified Command representatives, instead be used for a meeting with the Heiltsuk Nation to conduct consultation so that a robust EIA can proceed.

Sincerely,
NG ARISS FONG

s.19(1)

Cc: HTC; HIRMD; Minister Heyman; Pader Brach; Minister Wilkinson; Minister Garneau;
Brian Wootton; Roger Girouard; Marc Sanderson; [REDACTED]